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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

NO. 88-7081

LEROY MCNEIL,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT STATE OF NORTH CAROLINA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

LEROY MCNEIL,	)	
	)	
Petitioner,	)	
	)	
v.	)	AFFIDAVIT OF MAILING
	)	
STATE OF NORTH CAROLINA	)	
	)	
Respondent.	)	

STATE OF NORTH CAROLINA
COUNTY OF WAKE

ELLEN B. SCOUTEN, being first duly sworn says:

1. I am an Assistant Attorney General for the State of North Carolina.

2. I am a member of the Bar of the Supreme Court of the United States.

3. On May 17, 1989 I personally placed the original and nine copies of the enclosed brief of respondent State of North Carolina in opposition to petition for writ of certiorari to the Supreme Court of the United States in an envelope properly addressed to the Clerk of this Court, with first class postage prepaid, and deposited the envelope in a mailbox belonging to the United States Postal Service within the City of Raleigh, North Carolina.

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COUNSEL OF RECORD FOR RESPONDENT
STATE OF NORTH CAROLINA

Sworn to and subscribed before
me this 17th day of May, 1989.

Donna R. Douglas
Notary Public

My Commission Expires: 12-21-93

QUESTIONS PRESENTED

I. IS THE TRIAL COURT'S INSTRUCTION THAT IF THE JURY ANSWERED ISSUE FOUR "YES" THEN IT WOULD BE THE JURY'S DUTY TO RECOMMEND A SENTENCE OF DEATH A CONSTITUTIONALLY PERMISSIBLE GUIDANCE OF THE DECISION-MAKING PROCESS DESIGNED TO INSURE THAT THE JURY ADDRESSED AND FOLLOWED ALL STATUTORY REQUIREMENTS IN IMPOSING OR REJECTING THE DEATH PENALTY?

II. WHETHER THE ALLOCUTION WAS PROPERLY NOT SUBMITTED AS A FORMAL MITIGATING CIRCUMSTANCE SINCE IT WAS NOT EVIDENCE AND THE JURY WAS ALLOWED TO CONSIDER THE ALLOCUTION.

III. WHETHER MILLS V. MARYLAND AFFECTS THIS PETITIONER'S SENTENCING HEARING SINCE THE TRIAL COURT'S INSTRUCTIONS DID NOT REQUIRE PETITIONER'S JURORS TO FIND MITIGATING CIRCUMSTANCES UNANIMOUSLY.

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Pursuant to the authority of Rule 22 and in the manner provided by Rules 33 and 34 of the Supreme Court Rules, the State of North Carolina responds to the petition of Leroy McNeil and requests that this Court deny the petition for writ of certiorari on the basis of the facts and authorities hereinafter set forth for the Court's consideration.

CITATION TO OPINION BELOW

Leroy McNeil was tried, and convicted on two counts of First-Degree Murder in Wake County Superior Court and given two sentences of Death. In an opinion reported in State of North Carolina v. Leroy McNeil, 324 N.C. 33, 375 S.E.2d 909 (1989), the Supreme Court of North Carolina found no error in the convictions, and affirmed the two judgments and two sentences of death.

JURISDICTION

Petitioner seeks to invoke jurisdiction of this Court under 28 U.S.C. § 1257(3). Respondent contends that the petition is not timely filed. The petition was filed on April 20, 1989, more than sixty (60) days after the Supreme Court of North Carolina rendered its opinion on February 9, 1989. The rules of this Court provide that the time for filing a Petition for Writ of Certiorari runs from the date the judgment sought to be reviewed is rendered, and not from the date of the issuance of the mandate. U.S. Sup.Ct. Rule 20.4.

STATEMENT OF THE CASE

I. Procedural History.

Defendant was tried at April 30, 1984, Criminal Session of Wake County Superior Court on Grand Jury Indictments charging First-Degree Murder of Elizabeth Faye Stallings on April 8, 1983, and First-Degree Murder of Deborah Fore on April 10, 1983, in Raleigh, Wake County, North Carolina. On May 9, 1984, the jury returned verdicts of Guilty of First-Degree Murder in both cases on the basis of premeditation and deliberation as well as felony murder. The trial court then conducted a sentencing hearing.

In the murder of Elizabeth Stallings the court submitted three possible aggravating circumstances, all three of which the jury found to be present: Defendant's conviction of a prior violent felony; the murder was committed during an armed robbery; and the murder was especially heinous, atrocious and cruel. In the murder of Deborah Jean Fore the court submitted the following aggravating circumstances: Defendant's conviction of a prior violent felony; the murder was committed during an armed robbery. The jury found both to be present.

On May 14, 1984, upon the jury's unanimous verdict that the defendant Leroy McNeil be sentenced to death in both cases, the court imposed a judgment of death in each case. The defendant gave Notice of Appeal to the Supreme Court of North Carolina on May 14, 1984. The Supreme Court of North Carolina found no error

in the guilt or sentencing phase of Petitioner's trial. State v. McNeil, 324 N.C. 33, 375 S.E.2d 909 (1989) in an opinion filed on February 9, 1989. Thereafter, Petitioner filed his Petition for Writ of Certiorari in this Court on April 24, 1989.

II. The Evidence at Trial.

On Friday, April 8, 1983, petitioner and his wife Penny were driving around Raleigh and drinking. Petitioner saw a young woman, whom neither of them knew, walking on the sidewalk. This was Elizabeth Faye Stallings, eighteen years old, unmarried, and a student at Wake Tech. Petitioner asked her did she want a ride, and after Penny told her it was okay, the woman got in the car with them. She told them she was going to the post office to purchase food stamps for her mother. Petitioner drove her there and told her he would wait for her. When she came back out and got in the car she accepted petitioner's invitation to have a beer and cocaine with them. Petitioner drove to a vacant house next door to his and Penny's residence on Alston Street. When they got inside the vacant house petitioner grabbed Elizabeth Faye Stallings around her neck and flipped his knife out. Petitioner forced her back in to the bedroom to the closet. He told her to give him the food stamps which petitioner then gave to Penny. He then made her pull up her top to see whether she had money in her bra. Petitioner then began choking Ms. Stallings with one hand while holding the knife in the other. Ms. Stallings was saying "Please, ya'll, don't hurt me." He told Penny to go next door and get his rifle, which she did. Petitioner told Penny to leave the room and when she did she heard a shot. Afterward, petitioner took the food stamps and sold them for $109.00. Petitioner also sold a ring he took from Ms. Stallings.

On Sunday, April 10, 1983, two days later, petitioner told Penny they had drunk up all the money and the rent was due the next day. Around eight or nine o'clock that night, petitioner and Penny went to the residence of Deborah Jean Fore, a woman who

petitioner knew but Penny did not. Deborah Jean Fore was twenty-three years old, graduated from St. Augustine's College in 1981, lived alone, and worked at the Department of Human Resources. Ms. Fore went with them to a store and then petitioner stopped the car on a deserted road, got his pistol from under the seat, put it in his belt and got out of the car. Ms. Fore got out of the car and went around to where petitioner was looking at a bad tire, at which time the petitioner shot her. After she fell, petitioner reached in her pocket and stole her keys and a dollar bill which was the only money she had. Petitioner tried to drag her body away from the road, but saw a car coming, and he jumped in his car and drove off. Petitioner went to Ms. Fore's apartment, used her key to get inside and stole her television set, her pocketbook and a set or rings. Petitioner then drove to a bank and attempted unsuccessfully to get cash with Ms. Fore's Teller II card. Later petitioner dropped Ms. Fore's purse into an abandoned well in his backyard and sold the pistol he used to kill Ms. Fore with and the rifle he shot Ms. Stallings with to a man named Bobby for $90.00.

Ms. Fore's body was found that night lying one to two feet off the paved road. Officers found no items of identification on the body and were not able to determine the identity of the dead woman that night.

On Monday, April 11, 1983, a pathologist, performed an autopsy on the body of Deborah Fore. He found a small hole in the left ear just behind the ear canal, with an abrasion ring around it, indicating an entrance bullet wound. He found stippling associated with a gunshot wound in the surrounding skin area. He found the bullet located on the right side of the lower part of the brain. The path of the bullet was horizontal and caused considerable hemorrhage and destruction of the brain tissue. The gunshot wound caused her death.

On Wednesday, April 13, 1983, Arthur Van Adams went to the vacant house on Alston Avenue next to the McNeil residence

because he was looking for a house to rent. When Mr. Adams went inside he discovered the nude, dead body of Elizabeth Faye Stallings lying on the floor, half inside and half outside a closet. There was a large amount of blood around the body, and a large amount of blood on the floor and spattered on the walls. There was feces directly under the left leg of the victim. This feces had dried, causing the leg to stick to the floor. Two pieces of a broken window frame were lying five or six feet from the victim. Latent fingerprint impressions were found on these pieces of wood. There were nails sticking out of these broken pieces of wood. Palm prints were found on the door frame, one of them in blood. The victim's clothes were lying in a pile on the floor.

On April 14, 1983 Dr. Gordon LeGrand performed an autopsy on the body of Elizabeth Faye Stallings. He found a stab wound in the lower left chest. This wound was three and one-half inches deep and penetrated the left side of the diaphragm, the left lobe of the liver, the stomach wall, stomach cavity and stopped at the back surface of the stomach. About a half pint of blood was in the parietal cavity. In Dr. LeGrand's opinion, because of the blood in the cavity, this wound occurred before death. Because of the nerves in the area, this would have caused the victim pain, but not unconsciousness. Dr. LeGrand found an inch long abrasion on the left chest. On the palm surface of the third finger of the left hand was a wound penetrating the skin down to the bone. On the back side of the left forearm there was an abrasion one and one-half inches long. On the back surface of the left shoulder was a bruise approximately three inches long and one inch wide. On the face above the left eyebrow in the middle of the left side of the forehead there was a swollen bruised and contused area. Below the left eye was a long thin scratch. These abrasions to the face were pre-mortem. The abrasion above the eye could have been caused by a blunt object. The one below the eye could have been caused by a narrow pointed

object such as a nail or a pick, and could have been made by the broken pieces of wooden window frame. There was a second wound to the liver in addition to the stab wound. The second wound was a bruising and could have been caused by blunt trauma such as a foot. This wound was pre-mortem. Dr. LeGrand also found abrasions over the right buttock and the sacrum. There was a bullet wound beside the right eye. The bullet had penetrated the skull through the right temple, causing swelling of the brain and death.

In examining the rectal area of the victim, Dr. LeGrand found fecal material around the anal orifice. Such material is often present in people in the agonal phase just prior to death where there has been a struggle. In examining the sexual organs of the victim, Dr. LeGrand found feces in the cavity of the vagina beyond the labia, an unnatural location for feces. In Dr. LeGrand's opinion it would take some sort of probing force to insert feces into the vagina. He found this material inserted approximately halfway up the victim's vagina. It would take more pressure than dragging to insert this material this far into the vagina.

Officers subsequently compared the latent palm prints and fingerprints with inked impressions of Leroy McNeil and found the palm prints on the door to be the left and right palm prints of Leroy McNeil, and the latent prints from the wood pieces to be the right index finger and the right ring finger of Leroy McNeil.

On April 23, 1982, petitioner asked to talk to officers. Petitioner then confessed to both the Stallings and the Fore murders.

The petitioner presented no evidence at the guilt phase of the trial.

At the sentencing phase, the State presented evidence that on July 10, 1976, in Mecklenburg County, petitioner unlawfully killed his wife, Cynthia Latham McNeil and that on May 16, 1977 petitioner pleaded guilty to the Felony of Voluntary Manslaughter

of Cynthia Latham McNeil and received a term of not less than eight nor more than ten years in prison.

At the sentencing hearing petitioner called Dr. Selwyn Rose, who is a lawyer and a forensic psychiatrist, practicing in Winston-Salem, North Carolina. Dr. Rose testified that he examined and tested the petitioner and found no evidence of insanity, psychosis, or severe mental illness, nor organic brain damage. In Dr. Rose's opinion petitioner has a chronic, severe, alcohol problem. This opinion is based solely on what Leroy McNeil told Dr. Rose and McNeil's statements to police. McNeil related to Dr. Rose that he spent most of his salary on drinking and was broke by the end of each weekend as a result.

Dr. Rose testified on cross-examination that he agreed with the conclusion of the psychiatrist who examined petitioner in 1983 that Leroy McNeil had nonconformist and defiant attitudes, narcissistic tendencies and low tolerance for frustration, as well as doubts about his masculinity. Petitioner's employer testified that petitioner was a hard and willing worker, very capable with machinery and got along well with fellow employees, but had attendance problems especially the day after payday. Petitioner was never drinking or drunk on the job.

REASONS WHY THE WRIT SHOULD NOT ISSUE

I. THE TRIAL COURT'S INSTRUCTION THAT IF THE JURY ANSWERED ISSUE FOUR "YES" THEN IT WOULD BE THE JURY'S DUTY TO RECOMMEND A SENTENCE OF DEATH IS A CONSTITUTIONALLY PERMISSIBLE GUIDANCE OF THE DECISION-MAKING PROCESS DESIGNED TO INSURE THAT THE JURY ADDRESSED AND FOLLOWED ALL STATUTORY REQUIREMENTS IN IMPOSING OR REJECTING THE DEATH PENALTY.

The North Carolina death penalty statute, G.S. § 15A-2000(c), provides that before a jury is permitted to return a verdict of death it must unanimously answer yes to four issues submitted to it at the conclusion of the sentencing phase in form of special verdicts. State v. McDougall, 308 N.C. 1, 301 S.E.2d

308 (1983). These four issues were submitted to the jury in the instant case as follows:

> ISSUE ONE:
>
> Do you unanimously find from the evidence beyond a reasonable doubt, the existence of one or more of the following aggravating circumstances?
>
> ISSUE TWO:
>
> Do you find from the evidence the existence of one or more of the following mitigating circumstances?
>
> ISSUE THREE:
>
> Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found by you is, or are, insufficient to outweigh the aggravating circumstance or circumstances found by you?
>
> ISSUE FOUR:
>
> Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you?[1]

Following these four questions there is then a space on the verdict form for the jury to make its recommendation as to punishment.

In this case the court instructed the jury in connection with Issues Three and Four as in part, as follows:

> In each case if you unanimously find beyond a reasonable doubt the mitigating circumstances found by you in that particular case are insufficient to outweigh the aggravating circumstances found by you in that particular case, you would answer Issue Three "Yes" in that case. If you do not so find or have a reasonable doubt as to whether they do, you would answer Issue Three "No" in that case. If you answer Issue Three "No" in any case, in either of the two cases, as to that case, it will be your duty to recommend that the petitioner be sentenced to life imprisonment. If you answer Issue Three "Yes" in a particular case, then it will be your responsibility to consider Issue Four in that particular case.
>
> Issue Four reads as follows: Do you unanimously find beyond a reasonable doubt

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[1] A copy of the Issues and Recommendation as to Punishment form in each case is contained in Appendix E to the Petition.

that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you?

If you reach Issue Four in either or both cases, you should consider it separately as to the Stallings case and as to the Fore case. In deciding this issue, you are not to consider the aggravating circumstances standing alone. You must consider them in connection with any mitigating circumstances found by you in a particular case. After considering the totality of the aggravating and mitigating circumstances, you must be convinced beyond a reasonable doubt that the imposition of the death penalty is justified and appropriate in that case before you can answer the issue "Yes." In doing so, you are not applying a mathematical formula. For example, three circumstances of one kind do not automatically and of necessity outweigh one circumstance of another kind. The number of circumstances found is only one consideration in determining which circumstances outweigh others. You may very properly emphasize one circumstance more than another in a particular case. You must consider the relative substantiality and persuasiveness of the existing aggravating and mitigating circumstances in making this determination. You, the jury, must determine how compelling and persuasive the totality of the aggravating circumstances are when compared with the totality of the mitigating circumstances found by you. After so doing, if you are satisfied beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the death penalty, then it would be your duty to answer that issue "Yes" in that particular case. If you are not so satisfied or have a reasonable doubt, then it would be your duty to answer the answer "No" in that particular case.

In the event that you do not find existence of any mitigating circumstances, you must still answer this issue. In such case, you must determine whether the aggravating circumstances found by you are of such value, weight, importance, consequence, or significance as to be sufficiently substantial to call for the imposition of the death penalty. Substantial circumstances may be contrasted with circumstances that are enuous, flimsy, abstract, imaginary, deceptive or negligible.

Substantial means having substance or weight, important, significant or momentous. Aggravating circumstances may exist in a particular case and still not be sufficiently substantial to call for the death penalty. Therefore, it is not enough for the state to prove from the evidence beyond a reasonable doubt the existence of one or more

> aggravating circumstances. It must also prove beyond a reasonable doubt that such aggravating circumstances are sufficiently substantial to call for the death penalty, and before you may answer Issue 4 "Yes" in either case, you must agree unanimously that they are.
>
> If you answer Issue Four "No" in a particular case, you must recommend that this petitioner be sentenced to life imprisonment. If you answer Issue Four "Yes" in a particular case, it would be your duty to recommend that the petitioner be sentenced to death in that particular case.[2]

Petitioner contends this instruction creates a mandatory capital sentencing process in violation of the Eighth Amendment requirement of individualized punishment. The State of North Carolina responds that the instructions insure guided discretion in making the statutory findings required for a recommendation of death, and keep the jury from exercising unbridled discretion to return a sentencing verdict which was inconsistent with the findings it made pursuant to the statutory scheme.

The sentencing function of the jury in a capital case is a grave responsibility. In a constitutionally acceptable statutory scheme, both the State and the petitioner are entitled to a sentence recommendation that is based solely on the facts of the case and the law. Given those facts and the applicable law, the jury must use its limited and guided discretion in fashioning a sentence recommendation, and must act within those guidelines and limits. The jury may not disregard the limitations imposed on it by statute. The jury has no more right arbitrarily to impose a life sentence than it does arbitrarily to impose a death sentence since in either case it would mean the jury has disregarded the very thing which makes the sentencing structure constitutional: limits on the jury's unbridled discretion. See Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); Profitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976);and

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[2] The complete text of the instructions is contained in Appendix F to the Petition. The quoted portion is at pages 467-470.

Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

These United States Supreme Court cases make clear that a state's statutory system in capital cases must be one which, while allowing discretion in imposing the sentence, appropriately guides and limits jury discretion in the imposition of such sentences.

The North Carolina death penalty scheme allows the jury to appraise the evidence and reason whether or not the death penalty is appropriate in the case during their consideration of the fourth issue. Once they do this and decide the fourth issue "Yes" they then have the duty to fill in the space on the verdict sheet stating that they unanimously recommend the death penalty, otherwise they would be acting capriciously and contrary to law. There is no constitutional flaw in this requirement.

II. PETITIONER'S JURY WAS ALLOWED TO CONSIDER PETITIONER'S ALLOCUTORY STATEMENTS, AND THE COURT PROPERLY DID NOT SUBMIT THE CONTENTS OF THE ALLOCUTION AS A FORMAL MITIGATING CIRCUMSTANCE, SINCE THE ALLOCUTION WAS NOT EVIDENCE.

Petitioner complains that the trial court and the North Carolina Supreme Court violated his Eighth Amendment rights in precluding the jury from considering as a mitigating factor an aspect of petitioner's character proffered as a basis for a sentence less than death, by ruling that the petitioner's allocution could not be submitted to the jury as evidence of the mitigating circumstance of remorse. The State responds that the Court did not preclude the jury from considering petitioner's allocution as a mitigating factor, but it properly refused to submit remorse as a formal, written mitigating circumstance to the jury since there was no evidence of remorse.

At trial the petitioner requested, through counsel, that he be permitted to participate in the final speeches to the jury and give a final speech to the jury. The trial court granted the petitioner's request. Petitioner made the following statement to the jury:

> I won't take up too much of your time because I realize there's nothing that I can say or anyone here in this courtroom can say that would bring back the lives of those two girls, even my saying that I'm sorry is not going to bring them back. This 13 or 14 months that I have been locked up or incarcerated has really brought a lot back to me. It made me realize that there's a lot that I have done, minor things and major things, that if I had to do them again now today I know that I would not do and I deeply say inside that I am sorry for what I have done and I wish there was some way that you all could take it under consideration and spare my life and give me a chance.

The trial court specifically instructed the jury to consider this statement, but he also instructed them that it was not evidence. Although the trial court denominated petitioner's statement as a final speech, the statement was actually an allocution.

Petitioner's attorney made no request that the sentiments expressed in his allocution be submitted to the jury in written form as a mitigating circumstance. The North Carolina Supreme Court has ruled that a petitioner has the duty to bring to the court's attention evidence of the existence of a mitigating circumstance, otherwise the judge has no duty to instruct on it. State v. Pinch, 306 N.C. 1, 292 S.E.2d 203 (1982), State v. Wilson, 322 N.C. 117, 367 S.E.2d 589 (1988). In this case not only did the petitioner's attorney fail to request that the allocution be submitted as a written mitigating circumstance, but the petitioner had no right to have the allocution submitted as a written mitigating circumstance since the allocution was not evidence. Under North Carolina law the trial court is required to instruct the jury only on the basis of actual evidence offered and received in open court. North Carolina General Statute § 15A-2000(b) provides in part:

> b. Sentence Recommendation by the Jury.-Instructions determined by the trial judge to be warranted by the evidence shall be given by the court in its charge to the jury prior to its deliberation in determining sentence. In all cases in which the death penalty may be authorized, the judge shall include in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance

> or circumstances from the lists provided in subsections (e) and (f) which may be supported by the evidence, and shall furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances. (emphasis added)

Although allocution is not argument, it still is not evidence, and may not be treated as such since it is unsworn testimony not subject to cross-examination. Since Leroy McNeil's purported remorse was not presented in the form of evidence, the judge had no duty to list it as a possible mitigating circumstance on the verdict sheet.

Allocution is a vestige of the common law; it is not included in North Carolina's capital punishment statute, nor allowed by court rule as it is in Maryland or by statute as it is in Virginia. Despite the fact that the statute and rules do not provide for it, the trial court in this case allowed Leroy McNeil to make an allocution. He gained a substantial benefit thereby. He was able to get his message before the jury; he was able to make a personal plea for mercy to the jury; he was not subject to cross-examination; he was not under oath so could fabricate as he wished; and he was free to bring up matters not in evidence which his counsel could not do in their closing arguments.

It would be unjust to allow petitioner to obtain the further benefit of his allocution as evidence, since it is not made under oath and not subject to cross-examination. The petitioner is entitled to use the Fifth Amendment as a shield, but he may not use it as a sword to secure the treatment of unsworn, uncross-examined testimony as a evidence. Since petitioner benefitted so amply from being allowed to allocute, and since allocution may not be treated as evidence, the trial court did not prejudice him by failing to submit remorse as a formal mitigating circumstance. Petitioner had the right to present evidence of remorse, and could have testified to his remorse under oath. Since there was no evidence to support remorse as a

mitigating circumstance, the trial court was correct in not submitting it.

It is well settled that the jury may not be precluded from taking into consideration the mitigating circumstances the petitioner proffers. Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973 (1978). However, this does not impose a requirement that every possible mitigating circumstance be submitted in writing to the jury. State v. McDougall, 308 N.C. 1, 301 S.E.2d 308 (1983).

Allocution has a limited role. The purpose of allocution is to allow the petitioner to make a personal plea to the sentencer to spare his life. State v. Zola, 112 N.J., 384, 548 A.2d 1022 (1988). It cannot be used as a vehicle to introduce evidence which would require submission of a written mitigating circumstance, because it is not under oath and not subject to cross-examination and therefore is not reliable. To preserve the integrity of the sentencing process, only sworn, cross-examined testimony can be the basis for formal submission of a mitigating circumstance.

There is no basis for petitioner's contention that there is agreement of authorities that "Lockett and its progeny require that a capital petitioner be given the opportunity to allocute, that it be unencumbered, and that the jury be told to consider it." (Petition, p 10)

In this case Leroy McNeil was given the opportunity to allocute, his allocution was unencumbered, and the jury was told to consider it. The essence of petitioner's complaint is that the jury was not told to consider the allocution as a basis for a formal mitigating circumstance. All that Lockett requires is that mitigation not be kept from the jury. Since petitioner's allocution was not kept from the jury he has nothing of which to complain, and there has been no constitutional violation.

III. THE DECISION OF THIS COURT IN MILLS V. MARYLAND DOES NOT AFFECT THIS PETITIONER'S SENTENCING HEARING SINCE PETITIONER'S JURORS WERE NOT INSTRUCTED TO FIND MITIGATING CIRCUMSTANCES UNANIMOUSLY.

Petitioner contends the procedure followed in his case expressly forbade the jury to consider mitigating evidence unless all twelve jurors unanimously found the existence of a mitigating circumstance relating to that evidence. He contends this procedure violates Mills v. Maryland, 486 U.S. ___, 100 L.Ed.2d 384 (1988). The State responds that not only does Mills v. Maryland not affect North Carolina's capital sentencing scheme, but Mills has no application to this case, since petitioner's jurors were not instructed to find mitigating circumstances unanimously.

Although the Supreme Court of North Carolina in State v. Kirkley, 308 N.C. 196, 302 S.E.2d 144 (1983), found no error in an instruction that the jury must be unanimous in finding that a mitigating circumstance exists, the trial court did not choose to give that instruction to the jury in petitioner's case. The trial judge instructed the jury that their verdict must be unanimous on every issue except Issue Two, which was the finding of mitigating circumstances.

The written forms entitled "Issues and Recommendations as to Punishment" in each case reveal that the word "unanimously" appears in Issues One, Three, and Four, but not in Issue Two. The issues on the forms for each separate murder are as follows:

> ISSUE ONE:
>
> Do you unanimously find from the evidence beyond a reasonable doubt the existence of one or more of the following aggravating circumstances.
>
> ISSUE TWO:
>
> Do you find from the evidence the existence of one or more of the following mitigating circumstances.
>
> ISSUE THREE:
>
> Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found by you is, or are,

> insufficient to outweigh the aggravating circumstance or circumstances found by you?
>
> ISSUE FOUR:
>
> Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you?[3]

(emphasis added)

The language on the Maryland form which caused the constitutional problem, according to Mills, is as follows:

> SECTION 2 Based upon the evidence, we unanimously find that each of the following mitigating circumstances which is marked "Yes" has been proven to exist by a preponderance of the evidence and each mitigating circumstance marked "no" has not been proven by a preponderance of the evidence.

Mills v. Maryland, supra, appendix to opinion. (emphasis added)

In Leroy McNeil's case, neither the instructions nor the verdict form required the jury to find mitigating circumstances unanimously as did the Maryland form struck down by this court.

Petitioner has cited no portion of the instructions or the verdict sheet which would lead a reasonable juror to conclude that no piece of mitigating evidence proffered by McNeil could be considered in his favor in the sentencing decision unless it was first found by all twelve jurors to make out a mitigating circumstance, as he alleges.

The instructions made no such statement, and the verdict sheet which the jurors had full access to in the jury room, expressly omitted the word "unanimously" from the second issue - consideration of the mitigating circumstances.

This petitioner could not have suffered the prejudice found in Mills. There is no Mills issue in this case, and no basis for granting certiorari.

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[3] A copy of the Issues and Recommendation as to Punishment in each case is included in Appendix E to the Petition.

CONCLUSION

There is no issue of constitutional magnitude presented by this case. North Carolina's capital sentencing statute is constitutional. It narrows the class of death-eligible murders and provides for consideration of mitigation and exercise of discretion. The statute was applied in this case in compliance with the Constitution. For the reasons and authorities set forth herein, the State of North Carolina respectfully submits that the Petition for Writ of Certiorari be denied.

This the 17 day of May 1989.

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ATTORNEYS OF RECORD FOR RESPONDENT
STATE OF NORTH CAROLINA

NO. 88-7081

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

LEROY MCNEIL,	)
	)
Petitioner,	)
	)
v.	)
	)
STATE OF NORTH CAROLINA	)
	)
Respondent.	)

CERTIFICATE OF SERVICE

I, Ellen B. Scouten, Assistant Attorney General, do hereby certify that I am a member of the Bar of the Supreme Court of the United States and that I have on this date served a copy of the foregoing Brief of Respondent State of North Carolina in Opposition to Petition for Writ of Certiorari upon the Attorney of Record for Petitioner Leroy McNeil by depositing same in the United States mail, first class postage prepaid, and properly addressed as follows:

Gordon Widenhouse
Assistant Appellate Defender
Post Office Box 1070
Raleigh, North Carolina 27602

This the 17 day of May, 1989.

LACY H. THORNBURG
Attorney General

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